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No. 72-348

In the
Supreme Court of the United States
OCTOBER TERM, 1972

JOHN A. HUTTER, et al.,
Petitioners,

vs.

JOHN TANCK, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, John Tanck, et al., oppose the Petition for Writ of Certiorari filed herein by petitioners, John A. Hutter, et al, for the reasons set forth below.

Opinions Below

The Petition for Writ of Certiorari correctly sets forth the Judgment of the United States Court of Appeals, 7th Circuit, which is dated April 5, 1972 (Pet. 10-11). However, the Petition fails to set forth the written opinion of the District Court from which appeal was taken by petitioners. Respondents deem that the District Court's written opinion is very relevant to these current proceedings and therefore sets it forth now;

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOHN A. HUTTER, et al.,

Plaintiffs,

vs.

JOHN TANCK, et al.,

Defendants.

ORDER OF DISMISSAL
Civil Action No. 69-C-593

This an action for damages arising out of allegedly excessive and discriminatory assessments of real property owned by the plaintiffs and located in Door County, Wisconsin. Defendants are officials, past and present, of the Township of Egg Harbor in Door County.

Jurisdiction is asserted under 28 U.S.C.A. § 1331, federal question, and 28 U.S.C.A. § 1332, diversity of citizenship. Each of these sections has the jurisdictional requirement that the matter in controversy exceed the sum of $10,000, exclusive of interest and costs.

The complaint alleges that the real estate taxes assessed each year against plaintiffs' property amount to approximately $3,000.

Defendants have moved to dismiss the complaint on the ground, among others, that the jurisdictional amount is not present.

An earlier action brought by these same plaintiffs and presenting substantially the same claim was dismissed by Judge Myron L. Gordon—decision and order dated April 24, 1969, in Civil Action No. 68-C-364. That dismissal

was affirmed by the court of appeals, adopting Judge Gordon's opinion. *Hutter Northern Trust* v. *Haen,* No. 17662, decided November 13, 1969, in an unpublished opinion. On April 27, 1970, the Supreme Court denied certiorari—397 U.S. 1062.

The following language from Judge Gordon's decision is dispositive of the issue in this action:

> "In my opinion, the complaint does not satisfy the jurisdictional requirement that the matter in controversy exceed $10,000. 28 U.S.C. § 1331. In a diversity action, the court is obliged to apply the substantive law of the state. Under § 74.73(1) Wis. Stats., an action to recover for illegal taxes paid must 'be brought within one year after such payment and not thereafter'.
>
> "Under the foregoing provision of the Wisconsin statutes, the plaintiffs' entitlement to recover for allegedly illegally assessed past taxes is very limited. While the complaint does not specifically assert the amount of the taxes paid for any given year, it would appear from a statement made on page 7 of the complaint that the plaintiffs contend that $3,000.00 was assessed for 1967. In view of the provisions of the cited Wisconsin statute, it is clear that the matter in controversy does not exceed the sum of $10,000."

The gravamen of the complaint in the earlier action is the same as the one in the present case. It is simply that plaintiffs allege that their real property was assessed too high and unfairly and contrary to law.

While the two complaints are not identical, the one in the present case is not so changed as to save it from the fate that befell the complaint in the earlier action. Of the six defendants name in this complaint, two were not defendants in the prior action; this complaint does not

seek injunctive relief; it does allege that the defendants conspired with certain other persons in making wrongful assessments; and the ad damnum clause in this complaint has been increased to $500,000 from the $100,000 sought earlier. These variances will not cure the jurisdictional infirmities which were found to exist in the earlier action. The reasoning and conclusions of Judge Gordon contained in the decision and order of April 24, 1969, in Civil Action No. 68-C-364 are equally applicable to the present action and I adopt them. This compels a similar result.

Now, therefore, based on the foregoing,

IT IS ORDERED that plaintiffs' complaint must be and it is hereby dismissed.

Dated this 2nd day of September, 1970.

John W. Reynolds
U. S. District Judge

Further, petitioners' Appendix contains the complaint which was filed originally. While harmless, it does contain a deviation from the complaint served on respondents, in that paragraph 10 of the complaint as served recites "100,000 %", while the complaint as reproduced in the petition recites "24,000 %" (Pet. p. 8).

Jurisdiction

The petition invokes Title 28 U.S.C. §1257(3) as jurisdiction. Clerly that is erroneous for that section refers to "State Courts; appeals; Certiorari". There is no doubt that this court has jurisdiction for a petition for a writ of certiorari, but respondents suggest that jurisdiction is by U.S. Code Title 28, §1254(1).

Questions Presented

From a favorable to petitioners reading of the petition, petitioners apparently (†) present two questions in the petition; the first is whether damages for tort are includable in arriving at jurisdictional amount, when the action for tort is provided for by state statute; secondly, whether the lower courts' dismissal was based on an erroneous understanding of the complaint (i.e., deprivation of constitutionally protected rights need not be "restricted" by "amount in controversy" consideration, if a mere allegation of damages is made).

Respondents respectfully suggest that the only question presented is whether or not the lower court correctly dismissed the complaint due to lack of jurisdiction after a favorable reading of the complaint and application of relevant law thereto.

Statutes and Regulations Involved

Petitioners claim Amendment 14 of the United States Constitution, "equality before the law and due process" is the constitutional (and presumably the only statute, regulation, constitutional provision, treaty or whatever) involved. Respondents represent that the Wisconsin substantive law, the United States District Court rules, the body of enunciated federal law on the subject of dismissal for lack of jurisdiction, the United States Code, including rules of procedure, are involved, and indeed were applied appropriately herein.

Statement of the Case

Petitioners' statement of the case recites that "the question of taxes is not involved here" (Pet. p. 3). Respondents' reading of the complaint, as concurred in by the

trial court and the Court of Appeals, finds no other question than taxation at all. Except for allegations of jurisdiction and damages, every paragraph of the complaint refers to "taxes". The accurate statement of the case is as follows: The original action was commenced by petitioners by complaint alleging aggrievement of petitioners by respondents in the past assessment and collection of real estate taxes levied on petitioners' real estate located within the jurisdiction of respondents in their official capacities as township officials. The complaint, as served, was not answered as such, but rather a motion to dismiss same was made on the grounds of lack of jurisdiction. The District Court required briefing in support of the motion to dismiss, which brief was duly filed and served. Opposition briefing was also filed and served. The Trial Court granted the motion to dismiss; the full text of the written opinion is set forth above. Appeal was taken by petitioners. The United States Court of Appeals, 7th Circuit, required briefs and oral argument, and eventually affirmed the District Court's decision; the full text of this decision is found in the petition filed herein. Now, of course, the petitioners are seeking a Writ of Certiorari from this court.

Grounds for Denying Writ of Certiorari

Respondents respectfully submit that there is, pursuant to Supreme Court Rule 19, absent the requirements

(1) That a court of appeals has rendered a decision in conflict with the decision of another court of appeals in the same matter;

(2) That a court of appeals has decided an important state or territorial question in a way in conflict with applicable state or territorial law;

(3) That a court of appeals has decided an important question of federal law, which has not been, but should be, settled by this court;

(4) That a court of appeals has decided a federal question in a way in conflict with applicable decisions of this court;

(5) That a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Further, respondents suggest that upon a review of the matters raised and passed on below, as shown by the relevant record, the petition for a Writ of Certiorari must be denied.

Argument

The record below is uncomplicated; a duly made motion to dismiss for lack of jurisdiction was granted, and upon appeal, affirmed. The inquiry of this tribunal is to review the matters raised and passed on below, as shown by the record. The United States Supreme Court does not ordinarily decide issues not presented by the parties. *Sherman* v. *U.S.*, N.Y. 1958, 78 S. Ct. 819, 356 U.S.C. 369, 2 L. Ed. 2d 848. The only issue presented by the record and the parties is that of original jurisdiction based on the pleadings.

The District Court's activity in the case has been confined to the question of original jurisdiction and that was the sole issue on appeal to the United States Court of Appeals, 7th Circuit. The United States Supreme Court would not decide questions which had not been passed upon by the Court of Appeals. *U.S.* v. *Fleischman*, App. Ct. D.C. 1950, 70 S. Ct. 739, 339 U.S. 349, 94 L. Ed. 906. *Owens* v. *Union Pac. R. Co.*, Wash. 1943, 63 S. Ct. 1271, 319 U.S. 715, 87 L. Ed. 1683, cert. den. 65 S. Ct. 57, 323 U.S. 740, 89 L. Ed. 593.

The original complaint (Pet. pp. 7-10) complains of the assessment and collection of local real estate taxes. The District Court, in addressing itself to the question of jurisdiction, applied relevant thought and law as it was obliged to do. The complaint, on its face, recites that the taxes were approximately $3,000.00 per year. Because the trial court was obliged to apply the substantive law of Wisconsin in this case, *Erie Railroad* v. *Tompkins*, 1938,

304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the Wisconsin statute of limitations on redress for alleged taxation wrongdoings, W.S.A. 74.73(1), amortized to deny jurisdiction to the court. Further, the Wisconsin substantive law provides for limits on tort liability also. W.S.A. 74.73 (applicable to Section 70.503 which implements Sections 70.501 and 70.502), 893.205(1), 893.20(1), 895.43(1), 893.21 (1). Any of the quoted sections of Wisconsin substantive law, all of which apply to the limitation of the kind of action attempted to be alleged, would require that only acts occurring in recent years could apply. Even if, then, there were no taxes whatsoever appropriate to petitioners' land over which the respondents exercise taxing power, the $10,000.00 jurisdictional amount is not satisfied, as it appears on the face of the complaint. Damages, either statutory or at common law, are measured by the Wisconsin substantive law and are the actual damages suffered. If, as appears in the complaint, the yearly tax is $3,000.00, this statute of limitations would operate to deny jurisdiction.

Exemplary and punitive damages cannot be calculated in the jurisdictional amount when such damages are not awardable. *Schroeder* v. *Nationwide Mutual Insurance Co.*, D.C. N.Y. 1965, 242 Fed. Supp. 787; *Hart* v. *Ben F. Brack Oil Co.*, D.C. Colo. 1962, 201 Fed. Supp. 465; *Dixon* v. *Northwest National Bank of Minneapolis*, D.C. Minn. 1967, 276 Fed. Supp. 98, and cases cited therein. The Wisconsin substantive law is directly on the point of whether punitive damages may be allowed or recoverable against Township officers. They may not. W.S.A. Sec. 895.43.

Arguendo, punitive damages are applied only under restricted circumstances. Mere allegation of maliciousness

is insufficient by itself to implement punitive damages. Under these considerations, then, certainly the inquiry into the amount of controversy must be independent of punitive damages. Then, as respondents contend, the court lacks jurisdiction as is apparent on the face of the petitioners' complaint. *Arnold* v. *Trocolli*, 344 F.2d 842, 2d Cir. 1965; *Tullos* v. *Corley*, 337 F.2d 884, 6th Cir., 1964. See generally *St. Paul Merc. Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845, (1938).

Clearly, then, the record before this Court at this time shows that the requisite jurisdictional amount was not present and a Writ of Certiorari would not bring up more record than the Court has before it now in the present petition and this response thereto.

Review by the Supreme Court on certiorari does not encompass local matters and questions of state law, the decision of which does not involve any violation of the Federal Constitution or laws. *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 86 L. Ed. 1620, 62 S. Ct. 1173, and cases therein cited.

The Supreme Court will look to the lower court for the original examination of local questions, and rely for aid upon that court's explanation of its conclusion. *Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U.S. 188, 83 L. Ed. 598, 59 S. Ct. 448.

This Court has said that where it does not appear on the face of the complaint that the jurisdictional amount is involved, a Federal District Court should dismiss the case *sua sponte* or upon defendant's motion. *Kvos, Inc.* v. *Assoc. Press*, 1936, 299 U.S. 269, 81 L. Ed. 183. Further, this Court has said that its review of the lower court's determination of the jurisdictional amount must be con-

fined to the record. *Thompson* v. *Gaskill*, 1942, 315 U.S. 442, 86 L. Ed. 951 and citations therein. See Annotation 81 L. Ed. 189.

Petitioners' attempt to bring forward an altogether new interpretation of the complaint is beyond the scope of proceedings had herein below and certainly beyond the applicability of this Court's Writ of Certiorari at this time. The Writ of Certiorari should not be granted.

> "Generally speaking, the Supreme Court gives deference to the views of a lower federal court on questions of local law, and will not re-examine the local law as applied by such courts. In dealing with issues of state law that enter into judgments of lower federal courts the Supreme Court is hesitant to overrule decisions by federal courts skilled in the law of particular states, unless their conclusions are shown to be unreasonable. Thus, on a direct appeal from a Federal District Court, the Supreme Court will give proper weight to the District Court's conclusions as to the force and effect of statutes or ordinances of the state in which the court is sitting, and similarly on certiorari to review a judgment of a Court of Appeals reversing an order of a District Court, the Supreme Court will give special weight to a construction by the District Court of the law of the state in which it is sitting. So too, a decision of the United States Court of Appeals as to the law of a state included within the circuit will ordinarily be accepted and left undisturbed by the Supreme Court; that is, the Supreme Court ordinarily accepts the determinations of Courts of Appeals on questions of local law, or such courts' interpretations of state or local law, particularly where neither party to the litigation before the Supreme Court disputes the Court of Appeals' interpretation of the local law, or when the same finding is made by the District Court. A decision of a Court of Appeals as to the

law of a state included within the circuit will be left undisturbed by the Supreme Court where reasonable arguments can be made based on state cases to support a determination of the question either for or against the petitioner's contention. Moreover, it has been held, for example, that the Supreme Court would accept without review the finding of the United States Court of Claims on a question of conveyancing and real property law depending on local law and, being peculiar to the one case, not of general interest. However, although the Supreme Court is disposed to accept the construction which the lower court places on a local statute or ordinances, that disposition need not be yielded to where the lower court is clearly wrong.

"A plain showing of error is required for the Supreme Court to overrule lower federal courts in their application of the rule that in diversity cases federal courts are to apply state law."

32 Am. Jur. 2d, *Federal Practice*, §313 (with citations) pp. 796-8.

Respondents refrain from comment on the scandalous matter found in the petition on file herein.

Conclusion

The court has before it, by virtue of the petition and this response thereto, the complaint, the District Court's decision, the decision of the United States Court of Appeals, 7th Circuit, and argument of both petitioners and respondents. Nothing more could be gained by the issuance of a Writ of Certiorari and a return thereto, for the proceedings below were indeed brief and uncomplicated. Applying relevant consideration and law as herein outlined, respondents respectfully represent that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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